84-421

ORIGINAL (3)

Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS
CLERK

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In pro se

SUPREME COURT OF THE UNITED STATES

ROBERT ROWLAND and
JOSEPH COSENTINO, M.D.
Petitioners
VS.
LEROY W. DEMERY, M.D.
Respondent

CASE NO. 84-421

RESPONDENT'S BRIEF

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43 pp

TO THE SUPREME COURT OF THE UNITED STATES:

PURSUANT TO THE LETTER FROM THE CLERK OF THE UNITED STATES SUPREME COURT DATED NOV. 7,1984 THE FOLLOWING BRIEF IS SUBMITTED. FROM A STUDY OF THE U.S. SUPREME COURT'S DECISION IN BUTZ vs. ECONOMOU (98 SCT. 2894), DEMERY'S UNDERSTANDING IS THAT IMMUNITY IS DETERMINED BY THE NATURE OF THE VIOLATION, THEREFORE A PRESENTATION OF THE ENTIRE CASE IS INDICATED.

THE CASE

THERE WERE FIVE DIFFERENT LEGAL ACTIONS TAKEN AGAINST DEMERY RESULTING FROM THE SAME SET OF COMPLAINTS, THEREFORE ALL ARE RELATED.

THE CASES WERE BASED ON 36 PRESCRIPTIONS WRITTEN BY DEMERY FROM APRIL 2,1975 THRU JUNE 4,1975 AND FROM MARCH 26,1976 THRU MAY 7,1976. THE RECORD OF THESE PRESCRIPTIONS ARE SHOWN IN THE APPENDIX PAGE A 1 THRU A 2 OF THIS BRIEF.

THE PRESCRIPTIONS WERE GIVEN TO STATE AGENTS POSING AS PATIENTS. THE CASES WERE BUILT ON THE AGENTS ACCOUNT AS TO WHAT HAPPENED IN DR. DEMERY'S OFFICE DURING THE CONSULTATION.

DEMERY WAS CHARGED WITH VIOLATING CALIF. HEALTH AND SAFETY CODE 11154. (PAGE A-21). DEMERY WAS ARRESTED AND TRIED IN THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. THE TRIAL FROM MAY 13,1976 THRU MAY 17,1976 AND INVOLVED 24 COUNTS, SIX OF WHICH WERE CALLED FELONIES. SINCE THE ALLEGED FELONY COUNTS ARE WHAT LEAD TO THE SUPERIOR COURT TRIALS WE ARE DEALING LARGELY WITH THE NINE ALLEGED FELONY COUNTS.

THE INDICTMENTS WERE FRADULENT AS THEY WERE BASED ON THE

- PRESCRIPTIONS WRITTEN FOR EMPIRIN COMPOUND WITH CODEINE AND FOUR OF THE INDICTMENTS READ CODEINE ,ALSO KNOWN AS EMPIRIN COMPOUND WITHCODEINE, AND TWO READ CODEINE, HOWEVER ALL SIX WERE WRITTEN FOR EMPIRIN COMPOUND WITH CODEINE.

THE SECOND COURT TRIAL WAS IN OCTOBER 1977 AND THE PRESCRIPTIONS USED AS A BASIS FOR THE INDICTMENTS WERE WRITTEN FOR EMPIRIN COMPOUND WITH CODEINE, HOWEVER THE INDICTMENTS READ CODEINE, A NARCOTIC. COPIES OF THE INDICTMENTS AND THE PRESCRIPTION UPON WHICH THEY WERE BASED ARE ON PAGE A 3 thru A 21.

CODEINE IS A SCHEDULE 11 CONTROLLED SUBSTANCE WHICH IS A NARCOTIC DRUG. (CALIF. H&S CODE 11032). EMPIRIN COMPOUND WITH CODEINE IS A SCHEDULE 111 CONTROLLED SUBSTANCE WHICH IS A RESTRICTED DANGEROUS DRUG, THE SAME AS ALL PRESCRIPTION DRUGS. (CALIF. H&S CODE 11032). SEE PAGE A22 FOR COPY OF CODE.

A VIOLATION INVOLVING CODEINE WOULD BE A FELONY (CALIF H&S CODE 11371) PAGE A23. AND IN CALIFORNIA ALL CONTROLLED SUBSTANCES CARRYING A FELONY PENALTY REQUIRE THE NARCOTIC TRIPLICATE FORM TO PRESCRIBE. A VIOLATION INVOLVING EMPIRIN COMPOUND WITH CODEINE WOULD BE A MISDEMEANOR.(CALIF H&SCODE 11374) PAGE A24.

THIS FRAUD WAS CARRIED OUT IN ORDER TO TRY DEMERY IN SUPERIOR COURT WHEN ALL CHARGES WERE MISDEMEANORS. THIS FRAUD WAS SHOWN TO BE DELIBERATE AND INTENTIONAL WHEN DA CHOATE DURING THE SECOND TRIAL WHEN THE JURY WAS OUT DELIBERATING, ASKED JUDGE ALLEN TO ALLOW HIM TO CHANGE THE JURY FORMS ,AS THEY READ CODEINE AND SINCE THERE WAS NO EVIDENCE THAT CODEINE WAS USED, IF THE JURY-

- FINDS DEMERY GUILTY OF HAVING ABUSIVELY PRESCRIBED PURE CODEINE WE WILL BE IN A LOT OF TROUBLE. JUDGE ALLEN WOULD NOT ALLOW HIM TO MAKE THE CHANGE. CHOATE COULD HAVE ADMITTED THEY WERE WRONG AND ASKED TO HAVE THE CASE DISMISSED BUT HE DID NOT.

THE CASE AGAINST DEMERY WAS PUT TOGETHER WITH PERJURED DOCUMENTS OBTAINED BY ATT. GEN. KUPPERMAN. A DECLARATION UNDER PENALTY OF PERJURY BY AGENT BARBARA VAN DEIST AS TO WHAT HAPPENED IN DR. DEMERY'S OFFICE CARRIED A STATEMENT THAT DEMERY GAVE HER RITALIN AND QUAALUDE FOR PARTYING AND OTHER INFLAMATORY STATEMENTS HOWEVER AT THE SECOND TRIAL, AGENT VAN DEIST ADMITTED THAT THESE STATEMENTS WERE NOT TRUE AND THAT SHE HAD SIGNED THE DECLARATIONS WITHOUT READING IT, AFTER IT HAD BEEN PREPARED BY KUPPERMAN.
(SEE PAGE A26 THRU A29)

A DECLARATION UNDER PENALTY OF PERJURY BY AGENT COBURN ALIAS LAURIE MILLER AS TO WHAT HAPPENED IN DR. DEMERY'S OFFICE CARRIED A STATEMENT THAT SHE ASKED DR. DEMERY FOR PRESCRIPTIONS AND THAT HE WROTE THEM WITHOUT A QUESTION. HOWEVER AT THE COURT TRIAL SHE ADMITTED THAT THIS WAS NOT TRUE AND THAT SHE HAD SIGNED THE DECLARATIONS PREPARED BY KUPPERMAN WITHOUT READING IT. (PAGE A30 THRU A41 APPENDIX).

DEMERY WAS TRIED IN SUPERIOR COURT IN MAY 1976 WITH JUDGE JULIUS M. TITLE PRESIDING. AT THIS TRIAL THE DA FAILED TO HAVE A PHYSICIAN APPEAR TO OPPOSE TESTIMONY OF DR. DEMERY. THERE WAS NO CONTEST AND NOTHING TO HAVE THE JURY DECIDE. THE CASE WENT TO THE JURY ANYWAY AND A VERDICT 9 TO 3 NOT GUILTY WAS RETURNED. JUDGE TITLE SENT DEMERY BACK FOR RETRIAL

THERE WERE EIGHT ADDITIONAL COUNTS OF THE SAME NATURE THAT HAD OCCURED BEFORE THIS TRIAL BEGAN BUT WERE NOT PRESENTED. THESE EIGHT WERE CARRIED THRU A PRELIMINARY HEARING AND THE DA INDICATED THAT THEY WOULD TRY DEMERY SEPERATELY ON THE FIRST 24 COUNTS AND THE OTHER 8. JUDGE DRAKE OF THE LOS ANGELES SUPERIOR COURT ORDERED THE TWO CASES COMBINED.

WHILE AWAITING RETRIAL DEMERY FACED A CIVIL SUIT AND AN ADMINISTRATIVE HEARING BY THE BOARD OF MEDICAL QUALITY ASSURANCE. THE CIVIL SUIT WAS BROUGHT BY ATT.GEN. KUPPERMAN IN THE NAME OF THE MEDICAL BOARD. ON FRIDAY AUG. 13,1976 KUPPERMAN CALLED DEMERY BY TELEPHONE STATING THAT HE WAS APPEARING IN THE SUPERIOR COURT OF LOS ANGELES ON WED. AUG. 18,1976 TO SEEK AN INJUNCTION TO PREVENT DEMERY FROM PRACTICING MEDICINE. DEMERY INFORMRD KUPPERMAN THAT HE COULD NOT ATTEND AS HE WAS UNDER ORDERS FROM HIS DOCTOR TO CLOSE HIS PRACTICE FOR 30 DAYS AND TO AVOID ALL STRESSFUL SITUATIONS DURING THAT TIME. DEMERY'S BLOOD PRESSUE WAS ELEVATED AND HIS HEART WAS SKIPPING BEATS. DEMERY AND HIS DOCTOR THOUGHT THIS WAS AN AFTER EFFECT OF THE DEATH OF DEMERY'S WIFE WHO WAS KILLED IN A RAPE ATTEMPTON JUNE 8,1976. KUPPERMAN AGREED WITH DEMERY THAT HE WOULD POSTPONE THE HEARING UNTIL DEMERY RETURNED AFTER THE 30 DAYS. HOWEVER ON AUG. 18,1976 KUPPERMAN DID GO TO COURT AND TOLD JUDGE DOWD THAT DEMERY REFUSED TO APPEAR. JUDGE DOWD ISSUED THE INJUNCTION PREVENTING DEMERY FROM PRACTICING MEDICINE. WHEN DEMERY RETURNED FROM THE 30 DAY MEDICAL LEAVE AND APPEARED BEFORE JUDGE DOWD ON OCT. 2,1976 THE INJUNCTION WAS MODIFIED TO REQUIRE DEMERY TO DO A PHYSICAL EXAM. BEFORE PRESCRIBING CONTROLLED SUBSTANCES. DEMERY ACCEPTED THIS

- EVEN THOUGH HE FELT THAT THERE ARE INSTANCES WHEN A PHYSICAL EXAMINATION IS CONTRAINDICATED. DEMERY NEVER VIOLATED JUDGE DOWD'S ORDERS.

BEFORE THE HEARING KUPPERMAN WAS QUOTED IN THE NEWSPAPER," EVENING OUTLOOK" OF SANTA MONICA,CALIF. DATED SAT. SEPT. 18,1976 THAT DEMERY ADMINISTRATED HARD DRUGS TO KNOWN OR ADMITTED ADDICTS WITHOUT ASKING MORE THAN A FEW QUESTINS, AND THAT AT LEAST TWO PATIENTS DIED FROM DRUG OVERDOSES SHORTLY AFTER VISITING DEMERY'S OFFICE. THOSE STATEMENTS ARE COMPLETELY FALSE AND THERE HAS NEVER BEEN ANY EVIDENCE TO SUPPORT KUPPERMAN'S CHARGES.

THE ADMINISTRATIVE HEARING FOR THE MEDICAL BOARD TOOK PLACE FROM MARCH 30, THRU APRIL 11,1977. THE CASE WAS BASED ON THE TESTIMONY OF THE PAID STATE AGENTS WHO GAVE THEIR VERSION OF WHAT HAPPENED IN DR.DEMERY'S OFFICE. THE ADMINISTRATIVE LAW JUDGE BELEAVED THE AGENTS IN SPITE OF CONFLICTING TESTIMONY. FOR INSTANCE ONE AGENT ADMITTED SHE HAD BEEN WEIGHED ON A SCALE IN DEMERY'S OFFICE, THREE OTHER AGENTS STATED THAT THEY HAD EXPRESSLY LOOKED FOR A SCALE AND THAT THERE WAS NO SCALE IN THE OFFICE. WE HAVE PRESENTED FROM THE COURT TRIAL THE ADMITTED PERJURY OF TWO OTHER AGENTS. AGENT DALTON WHO WAS INVOLVED IN THE TRIAL OF ANOTHER DOCTOR WAS ACCUSED BY THE CALIF APPELLATE COURT OF HAVING VIOLATED LAW AND MORALITY IN HER EFFORTS TO OBTAIN A NARCOTICS PRESCRIPTION. DALTON WAS ASKED IF SHE HAD EVER VIOLATED HER INSTRUCTIONS IN WORKING DOCTORS, DALTON ANSWERED NO.

KUPPERMAN ATTEMPTED TO INTRODUCE TAPES THAT CARRIED THE RECORD OF WHAT HAPPENED IN DEMERY'S OFFICE AND ON PLAYING THE TAPES FOR DEMERY AND HIS ATTORNEY, THE TAPES WERE INAUDIBLE AND CONTAINED ERASURES AND THE ALJ WOULD NOT ALLOW THEM.

DURING THE HEARING IT BECAME OBVIOUS THAT THE AL.JUDGE DID NOT UNDERSTAND THE DIFFERENCE BETWEEN A MEDICAL EXAMINATION AND A PHYSICAL EXAMINATION. SINCE DEMERY HAS HAD EXTENSIVE TRAINING IN PSYCHIATRY HE CLAIMED THAT A PATIENT TALKING TO HIM HAS HAD A MEDICAL EXAMINATION EVEN THOUGH HE NEVER TOUCHED THE PATIENT. THE JUDGE ADMITTED THAT DEMERY USED HIS PSYCHIATRIC TRAINING IN HIS CONTACT WITH ALL OF THE AGENTS, BUT FOUND HIM GUILTY OF PRESCRIBING CONTROLLED SUBSTANCES WITHOUT A GOOD FAITH PRIOR EXAMINATION. THE AL JUDGE ALSO RULED THAT THERE WAS NO VIOLATION OF H&S CODE 11154.

THE BMQA ORDERED THAT DEMERY TAKE A SIX MONTHS COURSE IN GENERAL MEDICINE AS RECOMMENDED BY THE LOS ANGELES COUNTY MEDICAL ASSN. AND APPROVED BY BMQA FOLLOWED BY FIVE YEARS PROBATION DEMERY CONTACTED LACMA AND WAS TOLD THAT THEY HAD NO PROGRAM TO COMPLY WITH THAT REQUEST. DEMERY'S ATTORNEY CONTACTED THE BMQA AND THE EDUCATION PROVISION WAS WAIVED BECAUSE IT COULD NOT BE COMPLIED WITH. A PROBATION SURVELLENCE OFFICER WAS APPOINTED BY BMQA AND DEMERY WAS ALLOWED TO CONTINUE PRACTICE.

IN OCT.1977 DEMERY WAS BROUGHT TO TRIAL IN THE LOS ANGELES SUPERIOR COURT. JUDGE WARREN D. ALLEN TOOK JURISDICTION BY AN ILLEGAL RULING THAT SINCE " A TOMATO IN A SALAD IS STILL A TOMATO " CODEINE IN EMPIRIN COMPOUND WITH CODEINE IS STILL CODEINE AND THAT THE TWO ARE THE SAME. THIS IS IN VIOLATION OF CALIF H&S CODE 11032. DEMERY WAS THEN TRIED IN SUPERIOR COURT WITH THE CASE BEING BASED ON TESTIMONY BY THE SAME AGENTS WHO TESTIFIED AT THE ADMINISTRATIVE HEARING. JUDGE ALLEN STATED THAT THIS WAS HIS FIRST CRIMINAL TRIAL.MANY ERRORS WERE MADE.

- THE SAME TAPES THAT WERE INTRODUCED AT THE ADMINISTRATIVE HEARING AND REJECTED WERE ALLOWED. TYPEWRITTEN TRANSCRIPTS OF THE INAUDIBLE TAPES WERE GIVEN TO EACH JURIOR AS TAPES WERE BEING PLAYED. THIS WAS AS IF TO SAY THE TYPEWRITTEN SHEETS ARE WHAT YOU WOULD HEAR IF YOU COULD HEAR THE TYPES. JUDGE ALLEN REFUSED TO HAVE THE TAPES AUTHENTICATED BY AN EXPERT.

AGENT VAN DEIST BEGAN TO CRY ON THE WITNESS STAND AFTER SHE HAD ADMITTED PERJURY. THE REACTION OF JUDGE ALLEN IS SHOWN ON PAGE A42 & A 43 OF APPENDIX. BUT NOTHING WAS DONE.

DEMERY WAS FOUND GUILTY AND SENT TO STATE PRISON FOR NINETY DAYS OBSERVATION AND RETURNED TO COURT FOR SENTENCING ON APRIL 21,1978 . AT ONE POINT IN THE HEARING JUDGE ALLEN SAID HE WAS LEANING TOWARD PROBATION, THEN DA CHOATE ASKED DEMERY, WHAT ABOUT THE 17 YEAR OLD BOY WHO DIED FROM AN OVERDOSE IN YOUR PRACTICE. THIS IS COMPLETELY FICTITOUS. THERE WAS NEVER ANY ACQUISATION OF THIS. IF FACT DEMERY DID NOT HAVE PATIENTS UNDER 21 YRS UNLESS THEIR PARENTS CAME WITH THEM.

DEMERY WAS SENTENCED TO LAW PRESCRIBED ON THE FELONIES AND ONE YEAR ON THE MISDEMEANORS,THE SENTENCE WAS MADE CONSECUTIVE.

THE SENTENCE HAD NO LEGAL BASIS SINCE CALIF H&S CODE 11374 FOR MISDEMEANORS PROVIDES 15 TO 180 DAYS (PAGE A24) CALIF H&S CODE 11371 FOR FELONIES PROVIDE NOT MORE THAN ONE YEAR (PAGE A 23) THIS IS A SPECIFIED SENTENCE. EVEN WITH A CONSECUTIVE SENTENCE, THE METHOD OF CALCULATION USED BY STATE LAW, THAT IS THE FIRST TERM 12 MOS. PLUS ⅓ OF THE SECOND TERM 4 MOS. TOTAL 16 MOS. LESS ⅓ OFF FOR GOOD BEHAVOIR AND COOPERATION EQUALS 10 MOS & 20 DAYS . DEMERY WAS KEPT 2 YEARS.AN EXPIRED PENAL CODE

-- PC 3043 WHICH WAS REPEALED EFFECTIVE JULY 1,1977 WAS ADDED TO THE SENTENCE.(PAGE A 25).

DEMERY'S EFFORTS TO APPEAL HIS CASE WERE FRUSTRATED BY THE FACT THAT EVEN THOUGH THE TRIAL ENDED OCT. 31, 1977 THE TRIAL TRANSCRIPTS WERE NOT FURNISHED UNTIL FEB. 2,1979. THERE HAD BEEN NO MOTION TO EXTEND THE TIME FOR FURNISHING THE TRANSCRIPTS.

DEMERY HAD A COURT APPOINTED ATTORNEY TO PURSUE HIS APPEAL,HOWEVER ATT. RICHARD LEVIN DID NOT SEE OR TALK TO DEMERY BEFORE FILING THE APPEAL. DEMERY HAS ATTEMPTED TO BRING SOME OF THE MANY ERRORS AND ABUSES TO THE COURTS BUT HAS NOT BEEN ABLE TO HAVE THEM ACTED ON ACCORDING TO MERIT. ALL HAVE BEEN DISMISSED ON SOME OTHER GROUNDS.

THE IMMEDIATE CASE IS DESCRIBED IN THE MEMORANDUM AND FACTS OF LAW FILED IN THE U.S. DISTRICT COURT AND IS INCLUDED ON PAGE A 44 THRU A 50 OF THE APPENDIX.

CONCLUSION

DEMERY 'S ACTION AGAINST THE DISTRICT ATTORNEY BROUGHT UNDER PARA 1983 WAS DISMISSED CLAIMING ABSOLUTE IMMUNITY.

DEMERY'S ACTION AGAINST ATT. GEN. KUPPERMAN WAS DISMISSED CLAIMING ABSOLUTE IMMUNITY.

THE PRESENT PETITION FOR A WRIT OF CERTIORARI IS AN ATTEMPT TO GET THE OTHER TWO PARTIES OFF.

IN THE SPIRIT OF BUTZ vs ECONOMOU NONE OF THE PARTIES DESERVE IMMUNITY.

THE ABSOLUTE IMMUNITY OR ANY KIND OF IMMUNITY WILL JUST ENCOURAGE FURTHER ABUSES.

LEROY W. DEMERY PRAYS THAT THE SUPREME COURT OF THE UNITED STATES WILL TAKE ACTION TO CORRECT THE INJUSTICE OUTLINED IN THIS CASE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE, AND THAT THE MATERIALS INCLUDED IN THE APPENDIX ARE TRUE

DATED THIS 20 DAY OF NOVEMBER 1984 AT SAUGUS, CALIF.

LEROY W. DEMERY, M.D.

RECORD OF CONTROLLED SUBSTANCES PRESCRIBED

ED VOVERIS :

APRIL 2,1975
1-RITALIN 20mgm #100
2-NEMBUTAL gr1½ #30

MAY 2,1975
1-RITALIN 20mgm #100
2-Nembutal gr1½ #30

JUNE 6,1975
1-RITALIN 20mgm#100
2-NEMBUTAL gr1½#30
3-EMPIRIN 4 #50

GEORGE TUCKER:

APRIL 2,1975
1-RITALIN 20mgm # 100
2- QUALUDE 300mgm #30
3- EMPIRIN 4 # 50

JUNE 6,1975
1-RITALIN 20mgm #100
2-Qualude 300mgm #100
3-EMPIRIN 4 #50

JAMES YEARY :

APRIL 2,1975

1- NEMBUTAL gr1½ #30

SHARON DALTON :

APRIL 15,1975
1-NEMBUTAL gr1½ #30
2- IONAMINE # 30

MAY 9,1975
1-NEMBUTAL gr1½ #30
2- EMPIRIN 3 #50

JUNE 4,1975
1- NEMBUTAL gr1½#30
2-EMPIRIN 4#50

GEORGE BEARCROFT:

APRIL 15,1975
1- QUALUDE 300mgm #30

MAY 9,1975
NEMBUTAL gr1½ #30

BUFFORD Mc ZEAL
MAY 9,1975

1-EMPIRIN 4 # 50
2- NEMBUTAL gr1½ #30

LAURIE MILLER :

MARCH 26,1976

1- QUALUDE 300mgm # 30
2- RITALIN 20mgm #100

APRIL 23,1976

1-QUALUDE 300mgm #30
2-EMPIRIN 4 #50

DONNA MEAD :

MARCH 26,1976

1- QUALUDE 300mgm #30
2- EMPIRIN 4 #50

APRIL 23,1976

1-QUALUDE 300mgm #30
2- EMPIRIN 4 #50

BARBARA VAN DIEST :

APRIL 19,1976

1-Qualude mgm 300 #30
2-RITALIN 20mgm #100

MAY 7,1976

1- QUALUDE 300mgm #30
2- RITALIN 20mgm #100

IONAMINE A SCHEDULE IV CONTROLLED SUBSTANCE WAS NOT INCLUDED IN THE COURT CASE.

EACH PRESCRIPTION WRITTEN WAS CONSIDERED A COUNT

ALLPRESCRIPTIONS ARE FOR ONE MONTH'S SUPPLY.THERE ARE NO EXCESSES. ALL PRESCRIPTIONS ARE LEGAL.

CHEMICAL NAME	BRAND NAME
METHYLPHENIDATE	RITALIN
METHAQUALONE	QUAALUDE
PENROBARBITAL	NEMBUTAL
AMOBARBITAL	SODIUM AMYTAL
EMPIRIN 3 & 4	EMPIRIN COMPOUND WITH CODEINE GR 3 OR 4

AVAILABLE COPIES OF HANDWRITTEN

PRESCRIPTIONS ON PAGES

A-3 THROUGH A-20

ARE TOO FAINT TO BE REPRODUCED

AND CONSEQUENTLY HAVE NOT BEEN FILMED

BY CIS

EDITOR'S NOTE

PAGES A-21 thru A-26 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

§ 11154. Restriction on prescribing, furnishing, etc., substance to or for person not under practitioner's treatment

Except in the regular practice of his profession, no person shall prescribe, administer, dispense, or furnish, a controlled substance to or for any person who is not under his treatment for a pathology or condition other than addiction to a controlled substance, except as provided in this division.

Added Stats 1972 ch 1407 § 3.

Prior Law:

(a) Former § 11163.

(b) Stats 1929 ch 216 § 1b, as added by Stats 1933 ch 253 § 1½ p 783, amended by Stats 1935 ch 813 § 3 p 2206.

Cross References:

Prohibition against person prescribing, administering, or furnishing controlled substance for himself: § 11170.

Persons authorized to prescribe: § 11210; B & P C § 4036.

Limitations on right of veterinarian to prescribe, administer, or furnish controlled substance § 11240.

Punishment for violation of this section: § 11371.

Unauthorized prescribing, etc. of drugs for addict as unprofessional conduct by medical practitioner: B & P C § 2391.

Misuse of hypodermic needle and syringe as misdemeanor: B & P C § 4144.

Collateral References:

Cal Jur 2d Drugs and Druggists §§ 36, 38, Physicians, Dentists, and Other Healers of the Sick § 38.

25 Am Jur 2d Drugs, Narcotics, and Poisons § 5.

Annotations:

Entrapment defense in narcotics law prosecutions. 33 ALR2d 883.

NOTES OF DECISIONS

1. In General; Construction, Interpretation, and Application
2. Constitutionality
3. Prosecutions; Evidence
4. ——Sufficiency of Evidence
5. ——Instructions

1. In General; Construction, Interpretation, and Application

The gravamen of the offense defined in this statute is "to prescribe" or direct or order a narcotic to or for a person not under treatment for a pathology or condition other than narcotic addiction, and the offense may be committed without the use of a written prescription, as where a doctor in a hospital may prescribe or order a narcotic for a patient. People v Whitlow (1952) 113 CA2d 804, 249 P2d 35.

Since a violation of this statute does not necessarily involve a violation of § 11165 [11157] because elements indispensable to the lesser are unnecessary to the greater, the lesser is not a necessarily included offense. People v Whitlow (1952) 113 CA2d 804, 249 P2d 35.

The use of the word "false" in § 11165 [11157] does not inject the element of good faith into the crime defined in this section so that where a prescription otherwise regular is used as the instrumentality for violation of this statute, the prescription is vitiated by the use to which it is put and is transmuted into a "false" document; a "false writing" will not be construed to mean an unwarranted or false use of a genuine writing. People v Whitlow (1952) 113 CA2d 804, 249 P2d 35.

A physician may violate this section [former § 11163] by writing a prescription for a non-existent person. People v Braddock (1953) 41 C2d 794, 264 P2d 521.

Entrapment does not arise from a police officer going to a physician and obtaining from him a prescription for narcotics on the representation that the drug is to be used by the officer's wife.

A-21

Note—The repealed section defined the "State bureau" as the Bureau of Narcotic Enforcement.

Prior Law: Former § 11004, as amended by Stats 1945 ch 955 § 2 p 1839.

§ 11029. "Production"

"Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

Added Stats 1972 ch 1407 § 3.

Uniform Law: Uniform Controlled Substances Act § 101 subd (u).

§ 11030. "Ultimate user"

"Ultimate user" means a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household.

Added Stats 1972 ch 1407 § 3.

Uniform Law: Uniform Controlled Substances Act § 101 subd (w).

§ 11031. "Wholesaler"

"Wholsaler" has the same meaning as provided in Section 4038 of the Business and Professions Code.

Added Stats 1972 ch 1407 § 3.

Prior Law: Former § 11903, as added by Stats 1965 ch 2030 § 1, amended by Stats 1970 ch 1596 § 15.

§ 11032. Respective schedules to which terms "narcotics" and "restricted dangerous drugs" refer: Reference to term "marijuana"

Whenever reference is made to the term "narcotics" in any provision of law outside of this division, unless otherwise expressly provided, it shall be construed to mean controlled substances classified in Schedules I and II, as defined in this division. Whenever reference is made to "restricted dangerous drugs" outside of this division, unless otherwise expressly provided, it shall be construed to mean controlled substances classified in Schedules III and IV. Whenever reference is made to the term "marijuana" in any provision of law outside of this division, unless otherwise expressly provided, it shall be construed to mean marijuana as defined in this division.

Added Stats 1972 ch 1407 § 3.

Prior Law: Former § 11901, as added by Stats 1965 ch 2030 § 1, amended by Stats 1st Ex Sess 1966 ch 110 § 1, Stats 1968 ch 323 § 4, ch 1391 § 1.5, Stats 1970 ch 624 § 1, ch 1595 § 1, ch 1596 § 14.2, ch 1611 § 1, Stats 1971 ch 1593 § 200.

Collateral References:
Cal Jur 2d Drugs and Druggists § 26.

Law Review Articles:
The Official Report of the National Commission Studying Marijuana: More misunderstanding (1973) 8 USF LR 1.

A-22.

(1) Any felony offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055.

(2) Any felony offense described in this division involving a narcotic drug classified in Schedule III, IV, or V.

Amended Stats 1975 ch 1087 § 4.

Amendments:

1975 Amendment: Deleted "11351, 11352," after "11350," in subd (a).

Review of Selected 1975 Code Legislation, 7 Pacific LJ 392.

2. Probation

Defendant who had admitted a prior conviction of possession of narcotics and who, on his conviction of possession of heroin for sale had been denied probation, was entitled to have the conviction modified to one of simple possession and to have a new probation hearing, where the evidence would sustain a conviction of simple possession, but the conviction of possession for sale could not stand in view of reversible error in failing to instruct on the need for a specific intent to sell, where defendant's request for probation status had the effect of a motion to strike the prior, and where the denial of probation had been based, primarily, on the nature of the offense as possession for purposes of sale. People v Ruiz (1975) 14 C3d 163, 120 Cal Rptr 872, 534 P2d 712.

§ 11371. Violations with respect to prescriptions

Any person who shall violate any of the provisions of Section 11152, 11153, 11154, 11155, or 11156 with respect to (1) a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V, or who in any voluntary manner solicits, induces, encourages or intimidates any minor with the intent that such minor shall commit any such offense, shall be punished by imprisonment in the state prison or in a county jail not exceeding one year, or by a a fine not exceeding twenty thousand dollars ($20,000), or by both such fine and imprisonment.

Amended Stats 1976 ch 1136 § 1, ch 1139 § 80.5, operative July 1, 1977.

Amendments:

1976 Amendment (ch 1136): (1) Substituted "or 11156" for "11156, 11173, or 11174"; and (2) added all that part following "one year".

1976 Amendment (ch 1139—Operative July 1, 1977): Deleted "not exceeding six years" after "state prison".

§ 11371.1. Violations with respect to prescriptions: Fraud

Any person who shall violate any of the provisions of Section 11173 or 11174 with respect to (1) a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V, or who in any voluntary manner solicits, induces, encourages or intimidates any minor with the intent that such minor shall commit any such offense, shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year.

Added Stats 1976 ch 1136 § 4.

§ 11373. Ordering education or treatment as condition of probation

Whenever any person is granted probation by the trial court after conviction for possession of any controlled substance classified in Schedule I or II, such trial court shall, as a condition of probation, order such person to secure education or treatment from a local community agency designated by such court, if such service is available and the person is likely to benefit from the service.

If such defendant is a minor, the trial court shall also order his parents or guardian to participate in such education or treatment to the extent the court determines will aid the education or treatment of the minor.

If a minor is found by a juvenile court to have been in possession of any controlled substance classified in Schedule I or II, in addition to any other order it may make, such juvenile court shall order the minor to receive education or treatment from a local community agency designated by such court, if such service is available and the person is likely to benefit from the service, and it shall also order his parents or guardian to participate in such education or treatment to the extent the court determines will aid the education or treatment of the minor.

Added Stats 1972 ch 1407 § 3.

Prior Law:

(a) Former § 11715.9, as added by Stats 1970 ch 1130 § 1.

(b) Former § 11901.1, as added by Stats 1970 ch 1130 § 2.

Cross References:

Minors, who are: CC § 25.

Involuntary detention of minors using narcotics or restricted dangerous drugs: W & I C § 708.

Care of juveniles with drug abuse or addiction problems: W & I C § 5619.

Collateral References:

Education and research programs of the United States Attorney General concerning drugs and other controlled substances: 21 USCS § 872.

§ 11374. Misdemeanor offenses, and punishment therefor

Every person who violates or fails to comply with any provision of this division, except one for which a penalty is otherwise in this division specifically provided, is guilty of a misdemeanor punishable by a fine in a sum not less than thirty dollars ($30) nor more than five hundred dollars ($500), or by imprisonment for not less than 15 nor more than 180 days, or by both.

Added Stats 1972 ch 1407 § 3.

Prior Law:

(a) Former § 11716, as amended by Stats 1st Ex Sess 1940 ch 9 § 40 p 25.

(b) Stats 1929 ch 216 § 10 p 385, as amended by Stats 1933 ch 253 § 3 p 785.

A-24

§§ 3043, 3044. Repealed by Stats.1977, c. 165, p. —, §§ 49, 50, urgency, eff. June 29, 1977, operative July 1, 1977

Annotations Under Repealed Sections

SECTION 3041

1. In general

Inclusion of crime culminating in lesser, concurrent sentence, which as part of inmate's history of criminality is a lawful parole factor, in array of factors influencing length of confinement does not impair judicially decreed concurrency, and thus parole confinement extensions grounded on concurrent sentences do not constitute invasion of judicial sphere. In re Reed (1976) 126 Cal.Rptr. 524, 54 C.A.3d 1030, modified and rehearing denied 128 Cal.Rptr. 829, 54 C.A.3d 1030.

SECTION 3044

1. In general

Time credited to a sentence pursuant to § 2900.5 pertaining to credit for time in custody prior to commencement of sentence, operates to reduce statutory minimum sentences and time to be served in state prison prior to parole with the exception of the specific terms for parole eligibility set out in this section. 55 Ops.Atty.Gen. 318, 8-11-72.

§ 3046. Persons imprisoned under life sentence; minimum term; consideration of statements and recommendations; order

No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years. Where two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, no prisoner so imprisoned may be paroled until he has served at least seven calendar years on each of the life sentences which are ordered to run consecutively. The * * * Board of Prison Terms shall, in considering a parole for such prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Section 3042, and recommendations of other persons interested in the granting or denying of such parole. The board shall enter on its order granting or denying parole to such prisoners, the fact that such statements and recommendations have been considered by it.

(Amended by Stats.1977, c. 165, p. —, § 51, urgency, eff. June 29, 1977, operative July 1, 1977; Stats.1978, c. 579, p. —, § 32; Stats.1979, c. 255, p. —, § 23.)

Parole consideration procedures, see 15 Cal.Adm.Code 2265 et seq.

Prospective application of Stats.1978, c. 579, to crimes committed on or after January 1, 1979, see note under § 182.

Under Assembly Concurrent Resolution No. 2, 1977-1978, the legislature urged the Adult Authority or its successor to deny parole requests from individuals whose death sentences have been reduced to life imprisonment by judicial decision.

1977 Amendment. Substituted in the second sentence "Community Release Board" for "Adult Authority" and "Section 3042" for "Sections 3022 and 3042"; substituted in the third sentence "board" for "authority"; and deleted a provision that statements and recommendations be and remain confidential.

1978 Amendment. Inserted second sentence relating to consecutive life sentences.

1979 Amendment. Substituted "Board of Prison Terms" for "Community Release Board".

Legislative intent that Stats.1979, c. 255 only effect a change of name from the community release board to the board of prison terms, see note under Gov.C. § 11291.5.

Supplementary Index to Notes

Consecutive sentences 5.5
Eligibility for parole 4.5
Plea 2.5

1. In general

Adult authority may parole first-degree murderer after he has served minimum of seven years but may not discharge him from fixed sentence which, absent pardon or commutation, extends to his death. People v. Johnson (1974) 112 Cal.Rptr. 824, 38 C.A.3d 1.

The Adult Authority was vested with parole power and it, rather than the superior court which considered petitioner's habeas corpus petition, would determine whether petitioner would be granted parole after the restriction against parole was removed from his sentence of life imprisonment. In re Walker (1974) 112 Cal.Rptr. 177, 518 P.2d 1129, 10 C.3d 764.

2.5 Plea

Where, inter alia, defendant was informed of his rights to a speedy, public jury trial, to present a defense, to remain silent, to require proof of guilt beyond a reasonable doubt and to appeal and where, before taking defendant's guilty plea, trial court asked defendant if he knew the maximum term for first-degree murder and defendant replied "life imprisonment," defendant was not prejudiced by fact that trial court failed to tell him that life imprisonment was also the minimum sentence for first-degree murder and that he would have to serve seven years before being eligible for parole. People v. Johnson (1977) 135 Cal.Rptr. 756, 66 C.A.3d 197.

4.5 Eligibility for parole

A prisoner who is under a California life sentence while imprisoned in another jurisdiction will be eligible for parole by California authorities after he serves the seven-year minimum term in the prison of either jurisdiction. People v. Sewell (1978) 143 Cal.Rptr. 873, 574 P.2d 1231, 20 C.3d 639.

5.5 Consecutive sentences

Where defendant was sentenced to death on first count and sentences on remaining

counts were ordered to
one another but were
cution of sentence on
quirement that if the
count one were later re
es on remaining counts
tively with sentence
sentence on count one
life imprisonment other
modified as well, some
position of sentences
sentence, sentences on
merged into and ran

§§ 3047 to 3048.5 Rep
Ju

Both sections numbers
Stats.1945, c. 874,
Stats.1947, c. 1541,
pealed in 1976.
See, now, § 602.5.

§ 3049. Minimum impr

In all other cases
July 1, 1977 may be
provided by law for
where the prisoner
the minimum term of
any time after the
credits, but in no
provided, that any
prison or institution
minimum term of
after the expiration of
be paroled at any
(Amended by Stats.1

1976 Amendment.
sentence "sentenced

Law Review Commentaries

Prohibition of cons
cruel or unusual
L.R. 283.

Proof of aggravat
Determinate Sentencing
Delmen (1977) 10 Loyola
725.

Supplementary Inde

Construction with other law
Parole 2

1. In general

Petitioner, who was
sion of heroin with a
viction and who by
minimum term of
upon recidivist narcotic
gible for parole until
served, did not benefit
provision for mandatory
since his conviction
fective date of repeal
(1977) 138 Cal.Rptr. 284, 19

In light of fact that, as
gibility is concerned, parole
posed upon possessor of a
prior narcotic conviction,
more severe than that
who has suffered one
tion, and since legislature
seller's crime, while of the
possession, the more
statute precluding parole

Asterisks * * * indicate d

A-25

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff-Respondent

vs

LEROY WILLIAM DEMERY,
Defendant-Appellant

SUPERIOR COURT
NO. A320604

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE WARREND. ALLEN, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

EXCERPTS FROM THE TESTIMONY OF BARBARA VAN DEIST
PAGE471 thru473

EXCERPTS FROM THE TESTIMONY OF LAURIE COBURN AKA LAURIE MILLER
PAGE 571 thru 583

REMARKS OF JUDGE ALLEN PAGE 485 & 486

and reading that portion which you think refers to the partying, is that right?

THE WITNESS: Yes.

MR. SMOLEN: If I may, Your Honor, my specific question was with regard to a statement that she made in her declaration where she said, "In fact I told Dr. Demery I wanted the Quaalude and the Ritalin for partying."

And I was asking her if it's either on the tape or the transcripts, if she could point to that place where she said that to the doctor.

THE COURT: You are being asked --

Q BY MR. SMOLEN: Had he done that, Miss Van Diest?

A No.

Q So you didn't really say to the doctor, "I want Quaalude or Ritalin for partying," did you?

A No.

Q When you were asked to sign the declaration did you cross that out and make a correction there?

A No.

Q Did you have any idea what these declarations were going to be used for?

A No.

Q Did you know it was under penalty of perjury when you signed it?

A Yes.

Q Now, on your first visit, Dr. Demery told you that you could not have empirin and codeine unless you had a reason, or words to that effect, is that correct?

A Or words to that effect, yes.

Q And it is your testimony that he nevertheless wrote you prescriptions for two other medications and you never gave him any reason?

A Correct.

Q Did you ever tell Dr. Demery that you couldn't sleep?

A Never.

Q Did you ever tell him you were having difficulty sleeping?

A Never.

Q Does any discussion of sleep appear on the tape?

A No.

Q That you are certain about, is that correct?

A No.

THE COURT: Well now, wait a minute. We have got a negative question with a negative answer, and I can't tell, and I don't think the jury can, what the question and the answer mean.

This is so typical, counsel asks negative questions and you get negative answers, with the question ending with "is that correct," and the answer is "No," and we don't know what the answer is.

Start again, counsel.

MR. SMOLEN: I will start again.

Q Are you saying that you don't know whether -- strike that.

Are you saying that there is no discussion of

sleep on the tape?

A There shouldn't be any, no. There is -- no, there is not.

Q Are you certain of that?

MR. CHOATE: Aregumentative. Object.

THE COURT: Overruled.

THE WITNESS: To the best of my knowledge there is not.

Q BY MR. SMOLEN: Are there in fact -- isn't it true, Miss Van Diest, that there are -- there were a lot of words said by yourself and a lot of words said by Dr. Demery that are not audible on the tape and are not discernible in the transcripts?

A That's true.

Q Did you ever tell Dr. Demery you were depressed?

A Never.

Q And when you went to visit him on April 19th you say you had been up since -- or you got there -- what time did you first get there?

A Six a.m.

Q What time did you have to get up in order to get to the doctor's office at 6 a.m.?

A Five.

Q What area of the city were you living in at that time? I am not asking for your exact address.

A I believe I was living in Glendora.

Q Glendora?

A Yes.

Q Where is that?

your handwriting?

A Yes, it is.

THE COURT: What's the date?

MR. SMOLEN: It's dated August 5th.

THE COURT: Put a clip on it, because the clerk is going to have to find that in order to put a marking on it.

Q BY MR. SMOLEN: Now, did somebody hand you this declaration and ask you to read it and sign it?

A Yes.

Q Do you know who gave it to you?

A No, I don't recall now.

Q Do you know the circumstances under which this declaration was prepared?

A What do you mean by circumstances?

Q Well --

THE COURT: If you don't understand the question -- the questions only go from one direction, from the attorney to the witness.

THE WITNESS: Oh.

Q BY MR. SMOLEN: Do you know who Mr. Kuperman is?

A Yes.

Q He is the deputy attorney general who did the administrative hearing, is that correct?

A Yes.

Q And did you have a conversation with him before this declaration was prepared, where you gave him certain facts and even prepared the declaration and gave it to you and asked you to sign it?

A I had a couple of conversations over the phone with him.

Q He called you up?

A Yes.

Q And he asked you for information about your experiences at Dr. Demery's office --

A Yes.

Q -- is that correct.

And based on those, he then produced this declaration which you signed, is that correct?

A Yes.

THE COURT: We will take our morning recess. We will be in recess, since we started a little late, for a shorter time.

We will take a 15-minute recess, ladies and gentlemen, until about 18 minutes after 11. Please keep in mind the admonition of the court.

(Recess.)

THE COURT: You may proceed.

LAURIE COBURN

resumed the stand and testified further as follows:

CROSS-EXAMINATION (Resumed)

BY MR. SMOLEN:

Q Miss Coburn, there came a point in the -- in your visit of April 23rd, the same day you had the tape recording, where you told Dr. Demery that empirin codeine relaxes you, is that correct?

A Yes.

Q Were you telling Dr. Demery at that time that you were tense and needed something to relax you?

A No.

Q Well, when you said "It relaxes me," what did you mean by that?

A Well, he was pressing for an answer, and this was the first thing that popped into my mind, really.

Q So he was pressing for a reason why you wanted the empirin with codeine, is that correct?

A Yes.

Q And you knew you were not supposed to give a medical indication, is that correct? Is that true?

A True.

Q Did you say, "Empirin with codeine gets me loaded, makes me high, makes me feel good," anything like that?

A No.

Q Did you say, "I am a doper and I want to have a party Friday night and give all my friends empirin with codeine," and you wanted to have a nice party?

A No.

Q You said, "It relaxes me," is that correct?

A Yes.

Q You talked about the effect the medication has on your body in terms of, it makes you feel relaxed, is that correct?

A Yes.

Q Now, in your mind at that point were you giving

a medical reason for the use of the medication?

A I didn't think of it as a medical reason.

Q Isn't it true that the reason you said, "It relaxes me," was because you wanted the doctor to write the prescription and you wanted to give him a reason so he would write the prescription?

A Yes.

Q In fact -- you have never even used empirin with codeine, have you?

A Yes.

Q You have used it?

A Yes.

Q Does it relax you?

A No.

Q What does it do?

A It relieves pain.

Q So when you have pain you take the empirin with codeine and you no longer have the pain, is that correct?

A Correct.

Q You are more relaxed, is that correct?

A Well, in a sense, yes.

Q The pain makes you tense, does it not?

A A Yes.

Q So when you told Dr. Demery that empirin with codeine relaxes you, you were telling the truth, weren't you?

A Yes.

Q And that's because you wanted him to write the prescription, isn't that true?

A Yes.

Q You wanted that prescription. Right?

A Yes.

Q In fact when you said -- in talking about the empirin with codeine Dr. Demery said, "Why do you need this other stuff," and you said, "Well, does it matter," and he said, "Well, sure it does."

Isn't that true?

A We didn't say it exactly like that.

Q Oh, you didn't?

A I mean he said that, but he didn't -- he didn't say it in the same tone of voice you did.

Q He didn't use my emphasis?

A No.

Q But when you said to him, when he asked you why you need this other stuff, and you said, "Well, does it matter," he said, "Sure it does, it does matter," is that correct?

A Yes.

Q Now, wasn't the doctor communicating to you at that time that he wasn't just going to write you the prescription just because you asked for it?

MR. CHOATE: That calls for a conclusion as to what the doctor meant.

THE COURT: No, it implies what she thought the doctor was saying.

You certainly can't tell us what the doctor throught, but what you thought the doctor was saying to you.

Q BY MR. SMOLEN: What did you think Dr. Demery meant when he said "Sure it matters why you need it"?

A Well, because he did want an answer. He wanted a reason for the prescription.

Q A reason more than just your mere request for the prescriptions. Right?

A For that partciular prescription, yes.

Q So when you said, "I asked for them and he wrote them," is that a true statement?

A Pardon me?

Q That you asked for the prescriptions? At one point you said words to the effect, "I asked for the prescriptions and he wrote the prescriptions."

A Yes.

Q Is that in fact a true statement?

A Yes.

Q You hesitated. Was there more you wanted to say?

A Well, I asked for the prescriptions and he wrote them. That's what I had in my declaration. Is that what you are referring to?

Q Well, you also said that in court today.

A Okay. Well, he did. I mean there was a little bit of a conversation regarding it, but there -- you know -- there was no physical, nothing on where the pain was or anything.

Q Isn't it true that when Dr. Demery said "Sure it does, it does matter why you want the empirin with codeine,"

you knew he wasn't going to just write you the prescription because of your request, that you had to have some reason why you wanted it?

A True.

Q And you also knew that if you just said, "I just want it," that wouldn't be enough, didn't you?

A It might have been.

Q But you didn't say that, did you?

A No, I didn't.

Q In fact you talked about the effect that the medication had on your body, you said, "It relaxes me."

Isn't that true?

A True.

Q Doesn't that communicate that your body needs relaxation, because it's tense?

A Well, I would not think that there would be a drug given to someone for nerves or relaxation.

Q Well, that may be true, but the point is, when you say to somebody, "It relaxes me," and they ask you what a medication is for and you say, "It relaxes me," doesn't that -- aren't you communicating, "I'm tense, I need relaxation"?

A I didn't feel like I was particularly communicating that to him, no.

Q And you didn't feel that you were violating your instructions about not giving a medical reason when you said that to the doctor?

A No, I didn't feel like I was violating -- giving a medical reason.

Q You didn't think that was a medical reason?

A No, I didn't.

Q Now, when you signed this declaration for Mr. Kuperman -- may I approach the witness, Your Honor?

THE COURT: Yes. Referring to Exhibit I?

Q BY MR. SMOLEN: That was signed under penalty of perjury, is that correct?

A Yes.

Q And you understand what that means, do you not?

A Yes.

Q And you have a description here of your visit of April 23rd, 1976, is that correct?

A Yes.

Q And in your description you say, "I asked whether I needed a reason --" pardon me. Strike that.

You say, "He asked what I would like and I told him Quaalude and empirin with codeine. He said 'Fine' on the Quaalude but asked me why I wanted the codeine."

Is that what is in your declaration?

A Yes, I believe so. I mean I would have to reread the declaration to see if that is exactly --

THE COURT: Well, it's there before you. He wants you to look at it to see if that is what you said.

THE WITNESS: Okay. Is this is?

THE COURT: No, it's in the folder there.

MR. SMOLEN: It's in the folder that I placed on the ledge in front of you.

THE COURT: He is not talking about the declaration you

made back at the office.

THE WITNESS: Oh. Okay.

THE COURT: He is talking about this one that is in the file which involves this proceedings which you gave the number of.

THE WITNESS: I see what you mean. Where I said that?

Q BY MR. SMOLEN: I am talking about here, where it has the following language, quote:

"I was called into Dr. Demery's office. After greeting Dr. Demery I asked if he could write a couple of prescriptions for me. He asked what I would like, and I told him Quaalude and empirin with codeine. He said 'Fine' on the Quaalude, but asked why I wanted the codeine."

That's what you put in your declaration under penalty of perjury, is that correct?

A Yes.

Q Now, in fact we have already learned that when you said to Dr. Demery, "Would you write me a couple of prescriptions," he said, "I might. Just what do you need and how come," referring to both prescriptions, is that correct?

A True.

Q So in that regard your declaration under penalty of perjury is not correct, is it?

A I don't know how to answer that.

Q Well, is it correct or isn't it?

A This isn't corrected.

Q The declaration under penalty of perjury is not correct?

MR. CHOATE: Referring to the file, Your Honor.

THE COURT: Exhibit I.

THE WITNESS: Can I ask you a question?

THE COURT: No. If you understand the question, answer it please.

THE WITNESS: Okay.

Q BY MR. SMOLEN: Is this statement correct, the statement I just read, where Dr. Demery said "fine" on the Quaalude, but asked you why you wanted the codeiene? That's not a correct statement, is it?

A It was on March 26th that he said -- he used the word "fine" on the Quaalude.

Q Looking at your declaration, if you look at paragraph four, at the very top it says "On or about April 23rd."

A Yes, I can see.

Q And then it proceeds to describe what happened on that date, is that correct?

A True.

Q So isn't it -- so in other words your description in your declaration under penalty of perjury, in this superior court file, as to what happened on April 23rd, 1976, is not correct, in that particular, is it?

A No.

Q Then it goes on further to say, "I asked whether I needed a reason, and he said it was for pain. I did not

say anything else."

Now in fact when you said to Dr. Demery, "Does it matter," he said, "Sure it does," didn't he?

A Yes.

Q So that's not correct either, is it?

A No.

Q And then when you said, "I did not say anything else," it turns out that you later said, "It relaxes me," and that was your reason, isn't that true?

A True.

Q And you didn't put that in your declaration either, did you?

A I didn't write this up.

Q I understand that. You talked to Mr, Kuperman two times on the telephone and you gave him the information as to what happened, is that right?

A True.

Q And then he or somebody from his office came to you and had this typewritten declaration and asked you to read it and sign it under penalty of perjury, is that right?

A Yes.

Q And you read it and you signed it, is that right?

A I can't remember reading it, to tell you the truth.

Q Are you saying that you signed --

A I can't remember the exact -- even the day that I did sign it. I probably did skim through it or read through it, but I just assumed it was what had been discussed

on the telephone.

Q And are you now saying that's not what you told Mr. Kuperman?

A I can't recall our entire conversation on the phone, no.

Q Well, would you look at the declaration, ma'am.

Did you tell Mr. Kuperman that that's what happened, what's written in the declaration, or did you tell him something different?

A Well, it's basically what was said, except the part about the relaxation.

Q That was left out, wasn't it?

A Yes.

Q Did you tell Mr. Kuperman that you had told Dr. Demery that "the medication relaxes me," and that's the reason he wrote you the prescription?

A I don't recall.

Q So you may have said that?

A I may have. I may have not.

Q That wouldn't help the Department of Consumer Affairs' case, would it, if you told them that Dr. Demery -- you told Dr. Demery "it relaxes me," would it?

A I am not qualified to answer that.

MR. SMOLEN: I have nothing further at this time.

THE COURT: You may redirect.

MR. CHOATE: Thank you, Your Honor.

made in that regard -- and in other words, my understanding of the law is, if the witness has been excused I cannot put on any other evidence to impeach the witness and have that come in for all purposes.

THE COURT: Well, I don't understand it to be that way, but you may be right. In any event if that is the case the court is not going to prohibit you from putting on that impeaching testimony just because she has returned to some spa in Mexico.

In any event we will take a recess while you get the file -- which apparently is a great surprise to you that such a file exists -- up here during the recess so that you can confront her with the declaration and her signature.

MR. SMOLEN: It's not a surprise to me that the file exists, Your Honor. I never said that. I have known about the file --

THE COURT: Well, we are going to waste some more time while you get the file up.

We will be in recess for bout 20 minutes while you see if you can get the file. Do you know the number of the file?

MR. SMOLEN: Yes. I have the case number right in front of me.

Another thing, Your Honor. The witness is now crying on the witness stand -- which I have no idea what that's all about -- in front of the jury, and it is extremely prejudicial to the defense.

THE COURT: Do you know what I am about to do; I am

about to declare a mistrial in this circus, what I consider has become practically a circus. I have rarely if ever seen a case tried like this case is being tried. However, I am not going to do so at this time.

I do note in turning around that the witness is crying on the witness stand. It's unbelieable. I just can't believe that 14 people from the community are being subjected to a spectacle like this as to how our judicial system functions.

All right.

(The following proceedings were held in open court:)

THE COURT: We are going to be in recess, ladies and gentlemen, and we will be in recess for 25 minutes. Counsel wish to get some evidence here which they wish to use in recross-examination.

We will be in recess until five minutes of 3. Please keep in mind the admonition of the court.

The witness is ordered to return at that time.

(Recess.)

THE COURT: You had some further cross-examination, Mr. Smolen, before this witness is excused?

MR. SMOLEN: I have some more questions at this time, Your Honor.

THE COURT: All right.

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In Pro. Per.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEROY W. DEMERY, MD Plaintiff vs. LAWRENCE KUPPERMAN, et al Defendants	Case No. CV 81-4922-Kn(E) MEMORANDUM OF CONTENTIONS OF FACT AND LAW

TO: The Hon. Volney V. Brown, Jr., U.S. Magistrate

In compliance with Court Order of August 21, 1984, the following contentions of fact and law are submitted.

1- Dr. Demery's license to practice medicine was withheld by Employees of the Board of Medical Quality Assurance from March 1, 1978 to the present date, November 1, 1984, and they continue to withhold this license.

2- This was done without a legal basis and in violation of BMQA's Administrative Order which became effective on the 29th day of August 1977. This was also in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

3- This violation was carried out by the defendants and persons acting under their orders, claiming to enforce a portion of the BMQA's order relating to a provision for Medical Education.

A-44

4- The action was a ploy, a deliberate act of bad faith to keep Dr. Demery out of the practice of medicine.

DISCUSSION

BMQA's order provided that if Dr. Demery failed to comply with any of the terms and conditions of the order, the Board, after providing notice and giving Dr. Demery an opportunity to be heard, could terminate the probation and reimpose the order of revocation, or take other such action as BMQA in its discretion deemed just and reasonable.

Dr. Cosentino, without any notice to Dr. Demery, wrote a letter in December 1977 to Dr. Ludlow Creary regarding a program of Medical Education for Dr. Demery. Dr. Demery was not allowed to renew his License when it expired on February 28, 1978.

In December 1979, after being told by Dr. Joseph Gans in the local office of the BMQA that Dr. Demery had to take the course designated by Dr. Creary, Dr. Demery contacted Dr. Creary two days later and found out Dr. Creary had not designated a program.

In the interview with Dr. Gans in December 1979, Dr. Demery was told that his probation had been suspended by Dr. Cosentino and Mr. Robert Rowland, Executive Secretary of the BMQA. Dr. Demery indicated he would take the course and asked to see a copy of the outline of the course. Dr. Gans remarked, "Oh, we thought you would not agree to take it, I had it here somewhere." Dr. Gans then proceeded to look about his desk, then remarked, "I had it, but now I cannot find it, I will have to get in touch with Dr. Creary as he made it up, so I will get in touch with him and get back to you."

Dr. Creary indicated to Dr. Demery that he, Dr. Creary, had no

official connections with the BMQA, that he was at the time a member of the District Medical Review Committee but now was not, and that he had agreed to design this program as a favor.

Dr. Demery kept in contact with Dr. Creary, trying to facilitate the process of designing the program. Dr. Creary first indicated that there would be no charges for the program as Dr. Demery was one of the founding fathers of the Charles Drew Medical School, and further that Dr. Demery would be paid a stipend while he took the course. In August, 1980, Dr. Creary indicated that he could not get the stipend. In December, 1980, Dr. Creary indicated that Dr. Demery would have to pay tuition. In January, 1981, Dr. Creary indicated that the tuition would be $6,500. The only terms available were $1,500 down and $250 per week. However, no Medical Education program had been approved by the BMQA when Dr. Demery filed his court action on September 21, 1981. The fact that more than 5 years passed and there was still no BMQA-approved course available for Dr. Demery to take would appear to any reasonable mind that the defendants never intended that there be such a course. Instead, the defendants clearly intended to establish conditions that the plaintiff would not or could not meet, and thereby permanently deny renewal of Dr. Demery's license without benefit of due process.

Dr. Demery asked Dr. Cosentino by letter in December, 1977, to file a brief with Judge Allen, the California Superior Court judge in the criminal court trial , regarding the differences between Codeine and Empirin Compound with Codeine. Dr. Cosentino did not act on this request. It is difficult to understand why he did not. Even though we know he was not obligated to do so or compelled to

do so, the question as to why he would allow a fellow physician to go to state prison when it could have been prevented shows an extreme bias.

The fact is that Dr. Demery was tried in Superior Court due to an erronious ruling by Judge Allen that, "since a tomato in a salad is still a tomato," therefore Empirin Compound with Codeine was the same drug as Codeine. This is in violation of California Health and Safety Code 11032. If this issue had been clarified, Dr. Demery would have been released as all charges were actually misdemeanors under the Health and Safety Code, and he was tried in Superior Court (California Penal Code 1462, and People vs. Smith 231, CA 2nd 140, 41 CAL). If the chief medical consultant to the BMQA did not know the difference between "Codeine, A Narcotic Drug" and "Empirin Compound With Codeine" as specified in CA H&S Code 11032, then who should one look to? The lack of action by Dr. Cosentino on this issue reinforces the Plantiff's contention that the action on the Educational Provisions of BMQA's order was a ploy, and demonstrates the defendants' bad faith and intent to establish conditions that could not be met, therefore permanently withholding the plaintiff's license without due process. If Dr. Demery's license had been in effect, he could have hired an attorney to pursue the appeal of his court case and not have had to accept a court-appointed attorney , who proceeded without ever seeing or talking to Dr. Demery. Important issues such as Judge Allen's erronious ryling, were never presented to the courts, any one of which would have caused a reversal of the case.

Further withholding of Dr. Demery's license prevented him from earning any funds which would enable him to hire attorneys to

pursue any of the many legal legal ramifications in this case to provide him restitution.

Mr. Robert Rowland's role as executive secretary of the BMQA involves him on the principle that he either knew or should have known about this illegal activity within his area of responsibility. Robert Rowland was contacted by persons from the community regarding Dr. Demery's status. Robert Rowland did know of BMQA's violations and was responsible for the acts of state employees under his authority.

> As regards to a violation of this section (Para 1983 USC Title 42) the requisite causal connection can be established not only by some kind of direct personal participation in deprivation but also by setting in motion a series of Acts by others which the actor knows or reasonably should know would cause others to inflict the Constitutional injury (ld note 115 P 235 USC title 42).

This clearly binds Rowland and Cosentino as the responsible parties in this case.

The fact that Dr. Demery attempted to comply with the illegal acts of BMQA employees in no way could waive his constitutional rights. If the due process procedure had been observed, the entire case would have been reviewed and there is no possibility that this case would be upheld on appeal.

Since Dr. Demery was not notified of the proposed enforcement of the Medical Education requirement and given an opportunity to be heard before his license was withheld, the action is therefore ineffective. This means that the probation continued for five

years and ended September 1, 1982. The BMQA's Administrative Order ended at the same time and Dr. Demery's license should be fully restored subject to current conditions. The Defendants do not have the authority or the right to withhold, and continue to withhold, the plaintiff's license without due process.

Factors in the request for money damages:

1- Seven years of extreme emotional pressure

2- Projected earnings from March 1, 1978 to present

3- Loss of liberty and property

4- Damages to Dr. Demery's three children, all of whom were on their way to becoming professionals and halted due to this violation

The five million dollars asked is a pittance in regards to the damages actually done.

CONCLUSION

Dr. Demery's licnese to practice medicine has been withheld illegally since March 1, 1978 by the unlawful action of Joseph Cosentino, MD, Chief Medical Consultant to the BMQA, and Robert Rowland, Executive Secretary to the BMQA.

Dr. Demery prays that the Court will order that the action of Joseph Cosentino, MD, and Robert Rowland be ineffective and that Dr. Demery's license be restored subject to current conditions; and that the probation ended five years after it began on September 1, 1982; and that the Administrative Order ended on September 1, 1982;

And that Damages of Five Million Dollars be paid to Dr. Demery by Joseph Cosentino, MD, and Robert Rowland.

I declare under prnalty of perjury that the above statements are true.

Dated: November 1, 1984.

Leroy W. Demery, MD